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No. 01-690

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

MARGARET A. BAGLEY, Warden,

Petitioner,

v.

JOHN W. BYRD, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petitioner-Warden asks this Court to grant certiorari and review a capital case that is still pending in the Sixth Circuit Court of Appeals. In such instances, Supreme Court Rule 11 requires the petitioner to demonstrate that his case is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

The Petitioner has not mentioned Supreme Court Rule 11, much less attempted to demonstrate why this case is of such imperative importance that the Court should bypass the Sixth Circuit. The Court has sparingly used its power to review cases that are still pending in the federal courts of appeals, reserving that power for cases involving national emergencies such as strikes by steel and mine workers, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584-585 (1952), United States v. United Mine Workers of America, 330 U.S. 258, 269 (1947) or the subpoenas issued for the Nixon Whitehouse tapes during the Watergate trials, United States v. Nixon, 418 U.S. 683,687 (1974).

This is not one of those extraordinary cases justifying this Court's intervention before the court of appeals enters judgment. While the Petitioner-Warden's petition assumes that the AEDPA's strictures on filing a second or successive habeas petition apply to Byrd's case, that is in fact the very controversy pending before the Sixth Circuit: Whether 28 U.S.C § 2244 (b), the AEDPA statutory provision on second or successive habeas petitions, *can* be applied retroactively to John Byrd, whose initial habeas petition was filed prior to the effective date of AEDPA.[1] The court of appeals' answer to this question will determine if Byrd, who has argued

[1] Byrd's initial habeas petition was filed in March, 1994.

that he is actually innocent of the death penalty, is precluded from filing a second habeas petition.

No urgent need exists for the Court's intervention into the Sixth Circuit's deliberative process. The factual inquiry into Byrd's innocence about which Petitioner complains has been completed, and the Magistrate Judge has already sent his report and recommendations back to the Sixth Circuit. The court of appeals will now resolve the retroactivity issue in accordance with Landgraf v. USI Film Prods., 511 U.S. 244 (1994) and the appellate court's own decisions on the question of whether applying the new statute would attach a severe new consequence to the filing of Byrd's first habeas petition. In re Hanserd, 123 F. 3d 922, 931 (6th Cir. 1997); In re Sonshine, 132 F. 3d 1133, 1135 (6th Cir. 1997).

Despite the sharp rhetoric found in the opinions of the minority judges on the court of appeals, the Sixth Circuit's action in ordering the hearing was neither radical nor lawless. The court did not and has not allowed Byrd to file a second habeas petition in contravention of the AEDPA. Instead, the court of appeals is trying to decide whether AEDPA applies at all. The court simply set out an expeditious process for resolving the AEDPA retroactivity question presented in Byrd's case and is now proceeding to judgment. Thus, Petitioner has failed to demonstrate that the circumstances in this case are so exceptional that they justify deviation from the normal appellate process.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit's sua sponte decision to consider Byrd's petition for rehearing en banc was not lawless. Other circuits have found such action to be permissible under AEDPA.

In her petition, the Warden attacks the en banc court for its decision to consider rehearing en banc in Byrd's case. But the court's action was certainly not unprecedented under the circumstances presented in this case.

Byrd's execution was set for September 12, 2001. He exhausted all state remedies and was denied a hearing in state court on his claim that he was actually innocent of the death penalty. On September 6, 2001, as required by Sixth Circuit decisions, Byrd filed a motion in the court of appeals asking his original panel to determine whether the AEDPA's successor habeas provision, § 2244(b), applied to his case. As the panel noted, "[w]e must...determine whether the provisions of the AEDPA apply to this case, resorting to Landgraf's default rules to decide whether the AEDPA may be applied here." Pet. App. 57a.

On September 10, 2001 the panel issued an opinion determining that AEDPA did apply to Byrd's case. The panel, however, did grant Byrd an eight-day stay of execution to allow additional time for consideration. Pet. App. 50a. On that same date, Judge Danny Boggs, who was not on the panel, requested the en banc court to determine whether the eight-day stay of execution ought to be vacated. Pet. App. 82a.

The next day, September 11, 2001, the en banc court denied Judge Boggs' request. A majority of the judges voted to extend Byrd's stay until October 8, 2001. The en banc court also, sua sponte, directed the clerk to accept any petition for rehearing en banc offered for filing with the court. Pet. App. 82a. Byrd filed a petition for rehearing en banc the next day, September 12, 2001.

This was not a lawless action by a runaway court. The majority judges acted on the authority of decisions from two other circuits, the Second and the Ninth, holding that AEDPA does not prohibit sua sponte decisions to allow en banc review of a panel's decision under §

2244(b): Triestman v. United States, 124 F. 3d 361, 367 (2nd Cir. 1997) ("Nothwithstanding the restrictions on appealability in § 2244(b)(3)(E), this court has the authority to order a rehearing sua sponte"); Thompson v. Calderon, 151 F. 3d 918, 922 (9th Cir. 1998) ("the language [of AEDPA] does not preclude sua sponte review by an en banc court. It merely precludes the parties from seeking a rehearing."

The terms of § 2244(b)(3) simply do not state that they apply to rehearings en banc. Allowing a circuit court to sua sponte consider rehearing en banc does not "explode every limitation...contained within AEDPA." Pet. App. 23a. Rather, a circuit court's ability to order rehearing en banc is an essential part of an appellate court's process, for this is the only method the full circuit has to reconsider a panel's decision and resolve issues that its members may disagree over.

Use of the appeals court's power to sua sponte consider its own decisions is hardly lawless. The court could not decide whether to grant rehearing en banc without resolving the question of AEDPA's retroactive application. To resolve that question, the court then set out a process that was both orderly and expeditious.

B. The Sixth Circuit is determining what law applies – pre-AEDPA abuse of the writ doctrine or the AEDPA's successor habeas provisions. The court-ordered factual inquiry into Byrd's actual innocence evidence is central to this determination.

The question that John Byrd put to the Sixth Circuit was whether the AEDPA provisions concerning second habeas petitions could properly be applied retroactively to his case. The crux of this analysis involved an examination of the evidence Byrd submitted to support his claim of actual innocence of the death penalty.

Byrd admitted that he could not meet the "due diligence" test for filing a second habeas petition under AEDPA's § 2244 (b)(2) because the evidence of his innocence of the death

penalty was previously known to him. But Byrd argued that he *could* meet the pre-AEDPA "actual innocence" exception set out in this Court's abuse of the writ cases because he had "reliable evidence not presented at trial" to meet the "fundamental miscarriage of justice" gateway standard for filing a second habeas petition. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Schlup v. Delo, 513 U.S. 298, 324 (1995); Sawyer v. Whitley, 505 U.S. 333 (1992).

The Sixth Circuit has its own retroactivity jurisprudence on this issue. The circuit's retroactivity cases required the court to decide whether Byrd's evidence of innocence made a "difference that matters" between pre-AEDPA and post-AEDPA law on abuse of the writ. In re Hanserd, 123 F. 3d 922, 931 (6th Cir. 1997), In re Sonshine, 132 F. 3d 1133, 1135 (6th Cir. 1997). To answer that question, a majority of the Circuit Judges voted to retain jurisdiction of Byrd's case, while ordering a forty-five day remand to a magistrate judge for the limited purpose of conducting a factual inquiry into the evidence Byrd submitted to support his actual innocence of the death penalty. Pet. App. 1a – 3a. The facts developed at the inquiry will be analyzed against the Sixth Circuit's retroactivity case law to determine whether pre-or post-AEDPA law applies to Byrd's case.

The remand to a Magistrate Judge was not "a procedure unknown to the law." Pet. App. 22a. Actual innocence is a fact-intensive inquiry for which an appellate court is ill suited. Federal Appellate Rule 48 gives appellate courts the authority to remand matters to special masters such as district court judges or magistrate judges to conduct factual inquiries. See, e.g., NLRB v. A-Plus Roofing Inc., 39 F. 3d 1410. 1413 (9th Cir. 1994); Gulf Power Co. v. U.S., 187 F. 3d 1324, 1335 (11th Cir. 1999). See also. Harris v. Nelson, 394 U.S. 286, 299 (1969) (recognizing that courts may rely on their authority under the All Writs Act "in issuing orders appropriate to assist them in conducting factual inquiries.").

The en banc court of appeals sensibly remanded the matter to a Magistrate Judge with the power to take evidence and hear witnesses. The factual inquiry has been completed and the Magistrate has submitted his report and recommendations, which the Sixth Circuit is now considering. The *en banc* court is now in a position to make an informed determination of whether Byrd's evidence is sufficient to make the "difference that matters" between the pre- and post-AEDPA abuse of the writ standards.

The en banc court did not act lawlessly. To the contrary, this is a case where a majority of judges on the Sixth Circuit Court of Appeals conscientiously attempted to apply the court's AEDPA retroactivity jurisprudence to the circumstances in Byrd's case. The fact development before the Magistrate Judge was done to assist the court of appeals in deciding whether or not the AEDPA could be retroactively applied.

CONCLUSION

Despite the rhetoric quoted in the Warden's petition, the Sixth Circuit Court of Appeals is not a rogue court bent on gutting the provisions of the AEDPA. The Sixth Circuit has not given John Byrd permission to file a second habeas petition in contravention of the AEDPA.

The court of appeals decided, sua sponte, to consider Byrd's petition for rehearing en banc, an action that other circuit courts have found to be appropriate under § 2244(b)(3). The court is now in the process of deciding whether to grant rehearing en banc. Its decision will be made in accordance with the Sixth Circuit's Landgraf decisions governing retroactive application of the AEDPA. The factual inquiry into Byrd's actual innocence of the death penalty has been completed and the court of appeals is now considering the Magistrate Judge's report and recommendations.

Whatever the Court decides, its forty-five day turn-around order for factual development indicates that it will reach its determination without undue delay. Thus, the issues raised in the Warden's petition will likely be moot points prior to any grant of certiorari, briefing and argument before this Court. These prudential concerns alone, not to mention the fact that the Warden makes no effort to demonstrate why this case justifies review of a decision that is still pending in the court of appeals, militate against the Warden's petition. The petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Jane P. Perry, a member of the Bar of this Court, hereby certify that on this 21st day of December, 2001 a true copy of John Byrd's BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was deposited in a United States Mail Box, first class postage prepaid, pursuant to Rule 29, to Betty D. Montgomery, Ohio Attorney General, David M. Gormley, State Solicitor and James V. Canepa, Assistant Attorney General, 30 East Broad Street, 26th Floor, Columbus Ohio 43215. I further certify that all parties requiring to be served have been served.

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